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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Don Davis and Debra Davis, husband and  
10 wife,

11 Plaintiffs,

12 vs.

13 U.S. Bank National Association as Trustee)  
14 for RGMSI 2006S12 Residential Funding,)  
15 Mortgage Electronic Registration Systems,)  
16 Merscorp; Executive Trustee Services,)  
17 LLC; and Doe Corporations 1-40,

18 Defendants.

No. CV-11-01686-PHX-NVW

**ORDER**

19 Before the Court is Defendants' Motion to Dismiss Complaint (Doc. 6), which the  
20 Court will grant.

21 **I. Background**

22 On September 1, 2006, Plaintiffs executed a promissory note and deed of trust in the  
23 amount of \$510,000, secured by property located at 1095 W. Via Palmas, Queen Creek,  
24 Arizona 85242. At some point, Plaintiffs defaulted on their note, and a Notice of Trustee's  
25 Sale of the property was recorded on October 20, 2010. A trustee's sale of the property has  
26 not yet occurred.

27 Plaintiffs sought a preliminary injunction and temporary restraining order in Pinal  
28 County Superior Court on June 30, 2011. After Plaintiffs' request for a preliminary

1 injunction and temporary restraining order was denied, Plaintiffs filed the currently pending  
2 complaint for breach of contract, accounting, quiet title. Defendants removed the action to  
3 this Court on August 25, 2011 (Doc. 1).

## 4 **II. Legal Standards**

### 5 **A. Rule 8, Federal Rules of Civil Procedure**

6 A claim must be stated clearly enough to provide each defendant fair opportunity to  
7 frame a responsive pleading. *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996).  
8 “Something labeled a complaint . . . , yet without simplicity, conciseness and clarity as to  
9 whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a  
10 complaint.” *Id.* at 1180. A complaint must contain “a short and plain statement of the claim  
11 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Each allegation must  
12 be simple, concise, and direct.” Fed. R. Civ. P. 8(d)(1). A complaint having the factual  
13 elements of a cause of action present but scattered throughout the complaint and not  
14 organized into a “short and plain statement of the claim” may be dismissed for failure to  
15 satisfy Rule 8(a). *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988).

### 16 **B. Rule 9(b), Federal Rules of Civil Procedure**

17 “In alleging fraud or mistake, a party must state with particularity the circumstances  
18 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) requires allegations of fraud  
19 to be “specific enough to give defendants notice of the particular misconduct which is alleged  
20 to constitute the fraud charged so that they can defend against the charge and not just deny  
21 that they have done anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th  
22 Cir. 2001). “While statements of the time, place and nature of the alleged fraudulent  
23 activities are sufficient, mere conclusory allegations of fraud are insufficient.” *Moore v.*  
24 *Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Further,

25 Rule 9(b) does not allow a complaint to merely lump multiple defendants  
26 together but requires plaintiffs to differentiate their allegations when suing  
27 more than one defendant and inform each defendant separately of the  
28 allegations surrounding his alleged participation in the fraud. In the context  
of a fraud suit involving multiple defendants, a plaintiff must, at a minimum,  
identify the role of each defendant in the alleged fraudulent scheme.

1 *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal quotations, alterations,  
2 and citations omitted).

### 3 **C. Rule 12(b)(6), Federal Rules of Civil Procedure**

4 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material fact  
5 are assumed to be true and construed in the light most favorable to the nonmoving party.  
6 *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Dismissal under Rule 12(b)(6) can  
7 be based on “the lack of a cognizable legal theory” or “the absence of sufficient facts alleged  
8 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th  
9 Cir. 1990). To avoid dismissal, a complaint need contain only “enough facts to state a claim  
10 for relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570  
11 (2007). The principle that a court accepts as true all of the allegations in a complaint does  
12 not apply to legal conclusions or conclusory factual allegations. *Ashcroft v. Iqbal*, 129 S. Ct.  
13 1937, 1949 (2009). “Threadbare recitals of the elements of a cause of action, supported by  
14 mere conclusory statements, do not suffice.” *Id.* “A claim has facial plausibility when the  
15 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
16 defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to  
17 a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has  
18 acted unlawfully.” *Id.* To show that the plaintiff is entitled to relief, the complaint must  
19 permit the court to infer more than the mere possibility of misconduct. *Id.*

### 20 **III. Analysis**

21 Defendants moved to dismiss Plaintiffs’ complaint on September 1, 2011 (Doc. 6).  
22 Although Plaintiffs’ response to Defendants’ motion was due on September 19, 2011, no  
23 response has been filed with this Court. Failure to respond alone is grounds for the Court to  
24 grant Defendants’ motion to dismiss. *See* LRCiv. 7.2(i). The Court finds Plaintiffs’ failure  
25 to respond to Defendants’ motion constitutes acquiescence to the motion being granted.  
26 Nevertheless, the Court agrees with Defendants’ substantive analysis; the complaint fails to  
27 allege sufficient facts to state a plausible claim for breach of contract, accounting, or quiet  
28 title. The Court will therefore grant Defendants’ motion to dismiss on the merits for the

1 reasons stated in Defendants' motion.


2 **IV. Leave to Amend**

3 Leave to amend should be freely given "when justice so requires." Fed. R. Civ.  
4 P. 15(a)(2). Plaintiffs will be given an opportunity to amend their complaint to make clear  
5 their allegations in short, plain statements that state a plausible claim for relief. Any amended  
6 complaint must conform to the requirements of Rule 8(a), 8(d)(1), and 9(b) of the Federal  
7 Rules of Civil Procedure. Plaintiffs are warned that if they elect to file an amended  
8 complaint and fail to comply with the Federal Rules of Civil Procedure, the action may be  
9 dismissed. *See* Fed. R. Civ. P. Rule 41(b); *McHenry*, 84 F.3d at 1177 (affirming dismissal  
10 with prejudice of prolix, argumentative, and redundant amended complaint that did not  
11 comply with Rule 8(a)); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 673-74 (9th Cir.  
12 1981) (affirming dismissal of amended complaint that was "equally as verbose, confusing,  
13 and conclusory as the initial complaint"); *Corcoran v. Yorty*, 347 F.2d 222, 223 (9th Cir.  
14 1965) (affirming dismissal without leave to amend of second complaint that was "so verbose,  
15 confused and redundant that its true substance, if any, [was] well disguised").

16 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (Doc. 6) is  
17 granted.

18 IT IS FURTHER ORDERED that Plaintiffs may file an amended complaint by  
19 October 28, 2011. The Clerk is directed to terminate this case without further order if  
20 Plaintiffs do not file an amended complaint by October 28, 2011.

21 DATED this 6<sup>th</sup> day of October, 2011.

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23   
24 Neil V. Wake  
United States District Judge